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**In the Supreme Court of the United States**  
**OCTOBER TERM, 1978**

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**AMOS I. MAGGY, PETITIONER**

**v.**

**UNITED STATES OF AMERICA**

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**ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
NINTH CIRCUIT**

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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## OPINIONS BELOW

The findings of fact and conclusions of law of the district court (Pet. App. C, pp. 10-24) are not officially reported. The opinion of the court of appeals is reported at 560 F.2d 1372.

## JURISDICTION

The judgment of the court of appeals was entered on September 15, 1977 (Pet. 2) and the court of

appeals denied a petition for rehearing filed on behalf of petitioner on January 27, 1978 (Pet. App. B, p. 9). The petition for a writ of certiorari was filed on April 27, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

#### QUESTION PRESENTED

Section 6672 of the Internal Revenue Code of 1954 makes personally liable for taxes "[a]ny person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof \* \* \*."

The question presented is whether petitioner is personally liable under Section 6672 for taxes withheld from the wages of the employees of a corporation during his control of the corporation, where petitioner knowingly used the withheld taxes for corporate expenses, where the corporation thereafter acquired sufficient funds to pay the taxes prior to petitioner's termination of his control of the corporation and succeeding management failed to pay the taxes when they were due, and where petitioner also failed to pay the taxes after he resumed control of the corporation.

#### STATUTES INVOLVED

The pertinent provisions of Sections 6671, 6672 and 7501 of the Internal Revenue Code of 1954 (26 U.S.C.) are set forth at Pet. App. D, pp. 27-28.

#### STATEMENT

1. Petitioner and his wife owned 40 percent of the stock of Edmap Industries, Inc. On April 6, 1967, petitioner was elected president and chairman of the board of Edmap and retained the position of president until June 22, 1967. During this period, Edmap was in constant financial difficulty, as it had been since its inception in 1965 (Pet. App. A, p. 2; Pet. App. C, p. 15).

From April 6, 1967 to June 22, 1967, petitioner was in sole control of Edmap and decided which creditors of the corporation would be paid. During this period, petitioner was the person responsible for collecting and paying over income and F.I.C.A. taxes withheld from the wages of Edmap's employees (Pet. App. C, p. 14). The Edmap bank account for the period had an average daily balance of \$18, and a minimum balance reflecting an overdraft. Petitioner received a report of Edmap's financial condition at least once a week and was specifically advised that the corporation's account was overdrawn on two occasions. From April 6, 1967 to June 22, 1967, petitioner took no steps to maintain a balance in the Edmap bank account sufficient to cover the income and F.I.C.A. taxes withheld by the corporation from the wages of its employees (Pet. App. A, p. 2; Pet. App. C, p. 14).



On June 22, 1967, under threat of a total strike by all Edmap executives and employees, petitioner agreed to a reorganization of the corporation. Pursuant to the reorganization, petitioner resigned as president and a financial committee was established to make the decisions as to which of the corporate creditors would be paid. Petitioner remained an authorized signatory on the Edmap bank accounts and his signature alone was sufficient to withdraw funds until July 18, 1967. However, petitioner thought that his name was removed as an authorized signatory as of June 22, the effective date of the reorganization. After the reorganization, petitioner continued to work for Edmap and served as chairman of the board of directors (Pet. App. A, p. 3; Pet. App. C, p. 17).

During the period April 6, 1967 to June 22, 1967, petitioner was aware that Edmap was withholding income and F.I.C.A. taxes from the wages of its employees. He further knew that the corporation was required to pay these taxes over to the United States but took no steps to maintain a balance in the Edmap bank account sufficient to cover the income and F.I.C.A. taxes withheld by the corporation. However, petitioner was not aware that Edmap was required to purchase depository receipts for the taxes withheld for April and May, 1967, and Edmap did not purchase such receipts. During the second quarter of 1967 (April, May and June), Edmap withheld \$32,060.49 in income and F.I.C.A. taxes from the wages of its employees, no portion of which has ever been paid over to the United States. From April 6, 1967, until

Edmap ceased doing business in December 1967, petitioner knew that the creditors of the corporation were paid in preference to the United States (Pet. App. C, pp. 14, 16-18).

At the time petitioner resigned as president of Edmap on June 22, 1967, it had \$29,930.95 on hand in its bank accounts. That cash was sufficient to pay substantially all of the corporation's \$32,060.49 employment tax liability. Later that same day, \$19,854.04 was deposited to the corporation's bank account. On the next day, June 23, 1967, an additional \$23,433.96 was deposited to the account (Pet. App. C, pp. 16-17).

On July 7, 1967, the board of directors was advised of the corporation's withholding tax obligations. When petitioner returned from a two-week vacation in July, he was informed that the corporation's \$32,060.49 withholding tax obligation was due to be paid on July 31. Petitioner took no action on this information and did not bring it to the attention of the board of directors although he was serving as chairman of the board (Pet. App. A, p. 3; Pet. App. C, pp. 16-18).

On August 2, 1967, petitioner was reelected president of Edmap. As of July 31, the Edmap account contained \$6,417.12 and deposits totalling \$3,567.18 were made on August 1 and 4. After his reelection, petitioner made no attempt to pay any of these funds to the United States. On August 15, 1967, petitioner sold an account receivable in the amount of \$16,000 due from Douglas Aircraft to Edmap in exchange for a franchise agreement with Concept Development. From April 1, 1967, until Edmap ceased doing busi-

ness in December, 1967, petitioner was aware that Edmap's creditors were paid in preference to its withholding tax obligations to the United States (Pet. App. A, p. 3; Pet. App. C, p. 18).

2. Pursuant to Section 6672 of the Internal Revenue Code of 1954, the Commissioner of Internal Revenue assessed the full amount of Edmap's unpaid withholding taxes for the second quarter of 1967 (\$32,060.49) against petitioner as a responsible officer of Edmap (Pet. App. A, p. 1). Petitioner paid a portion of the assessment and thereafter instituted this refund suit in the United States District Court for the Northern District of California. The government counterclaimed for the balance of the assessment. The district court found that petitioner was a responsible officer of Edmap during the entire second quarter of 1967, despite his resignation as president on June 22, 1967. The district court further found that petitioner had willfully failed to collect and pay over the withholding taxes due the United States in that he had knowingly used funds representing those withheld taxes to pay the claims of other creditors. It therefore upheld the Commissioner's assessment against petitioner under Section 6672 (Pet. App. C, pp. 10-24). In the district court's view, the fact that the corporation had enough cash on hand to pay substantially all of the taxes due as of petitioner's resignation as president did not absolve him of personal liability for the unpaid taxes. As the court stated, "Since a responsible officer's liability accrues at the time the taxes are withheld from employee wages, the responsible officer

cannot escape liability by resigning one of his corporate positions on a date when the corporate assets happen to be high" (Pet. App. C, p. 22).

3. The court of appeals affirmed in part and reversed in part (Pet. App. A, pp. 1-8). It rejected the government's argument that petitioner was a responsible person throughout the entire quarter. "From the record \* \* \* [it could not] conclude that [petitioner] had the final word on what corporate bills were to be paid after June 22" (Pet. App. A, p. 5). It therefore held that "the district court committed a mistake in finding that [petitioner] was a responsible person for the entire relevant quarter" (*ibid.*). Thus, in the court of appeals' view, petitioner's liability under Section 6672 could extend only from April 1 to June 22, 1967, the date of his resignation as president of Edmap.<sup>1</sup>

As for the period April 1-June 22, the court of appeals rejected petitioner's claim that willfulness was lacking because there were adequate funds in the corporate bank account on June 22 to cover the taxes withheld up to that date. As the court stated, "Willfulness can be proven by the preference of other creditors over the United States either before or after the actual due date for remittance of the taxes" (Pet. App. A, p. 6). Since petitioner had allowed the corporate bank balance to fall below the amount of the

<sup>1</sup> The court of appeals erroneously referred to May 1, 1967 as the beginning date for the second quarter of that year (see Pet. App. A, pp. 1, 7). However, the second quarter begins on April 1.



taxes withheld during the period for which he was a responsible person, the court concluded that he risked subjecting himself to liability if, as in fact happened, insufficient funds were available on July 31 (the due date) to cover the taxes collected for the preceding quarter. Moreover, the court observed that when petitioner resumed the presidency of Edmap, he made no effort to pay the taxes due to the United States with the funds then available in the Edmap account or which it thereafter received. This action reinforced the court of appeals' conclusion that petitioner willfully preferred other creditors over the United States. It therefore ruled that petitioner was personally liable under Section 6672 for the amount of taxes required to be withheld from April 1 to June 22, 1967 (Pet. App. A, pp. 6-7).

#### ARGUMENT

1. a. Sections 3102(a) and 3402(a) and (d) of the Internal Revenue Code of 1954 require every employer to withhold federal income and social security taxes from the wages of his employees. Section 7501 provides that the withheld funds constitute a special trust fund in favor of the United States. If an employer withholds a tax but fails to pay it over to the United States, the employee is nevertheless credited with having paid the tax and the government will not require any additional payment from the employee. Thus, unless the government has recourse against the person responsible for the collection and payment of the tax, the revenues would be put in jeopardy.

Section 6672 of the Code gives the government recourse against the responsible person. It imposes personal liability upon "[a]ny person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof \* \* \*." The thrust of the statute is to impose personal liability upon those persons whose conduct results in the failure to pay withheld taxes. In the typical case, as here, the statute is used as a collection device against officers of a bankrupt corporation for the taxes withheld from its employees' wages.

b. Petitioner concedes that during the pertinent period he was the person responsible for collecting and paying over the taxes withheld from the wages of Edmap's employees. He contends, however, that his acquiescence in the depletion of corporate funds below the amount of the withholding tax liability during the second quarter of 1967 was not a willful preference of other creditors within the meaning of Section 6672 but mere negligence in failing to be aware that Edmap was required to purchase depository receipts for the withheld taxes (see Pet. 8-9). Petitioner asserts (*ibid.*) that the courts of appeals are in disagreement as to whether reasonable cause is properly taken into account in determining willfulness under Section 6672 and claims that his ignorance of the depository requirements constituted reasonable cause that absolves him of personal liability for the withheld taxes.

The courts of appeals have differed as to whether the standard of willfulness under Section 6672 should be construed to include lack of "reasonable cause" or "justifiable excuse." Both the Ninth and the Seventh Circuits have upheld the government's submission that reasonable cause plays no part in determining willfulness under Section 6672 because such a concept connotes evil motive or bad purpose which are irrelevant to the civil definition of willfulness. *Bloom v. United States*, 272 F.2d 215, 223-224 (C.A. 9), certiorari denied, 363 U.S. 803; *Monday v. United States*, 421 F.2d 1210, 1216 (C.A. 7), certiorari denied, 400 U.S. 821. On the other hand, the Fifth Circuit has held that "reasonable cause" is part of the civil test in determining whether the failure to collect, account for, and pay over is willful where such failure is a result of advice of counsel. *Cash v. Campbell*, 346 F.2d 670, 672-673; *Newsome v. United States*, 431 F.2d 742, 746-747; cf. *Gray Line Co. v. Granquist*, 237 F.2d 390 (C.A. 9). See also *Frazier v. United States*, 304 F.2d 528, 529-530 (C.A. 5).

Here, petitioner cannot claim to come within the "reasonable cause" rule adopted by the Fifth Circuit since his failure to collect, account for and pay over was not prompted by advice of counsel. To the contrary, during his tenure as Edmap's president, petitioner was in sole control of the corporation and knowingly used the withheld taxes for payments to other corporate creditors (see Pet. App. C, p. 14). While petitioner urges (Pet. 8) that his ignorance of the depository requirements of Treasury Regulations,

Section 31.6302 constituted reasonable cause, the decision of the court of appeals did not turn upon petitioner's failure to make periodic deposits. Hence, there is no occasion in this case for resolving the conflict as to the role of reasonable cause in determining willfulness under Section 6672 because petitioner's lack of awareness to the depository requirements is immaterial. His conduct would not absolve him of personal liability under either the decisions that have taken reasonable cause into account or those that have rejected the relevancy of reasonable cause.

2. Petitioner further argues (Pet. 9) that even if his knowing use of the withheld taxes for payment of other corporate creditors triggered personal liability under Section 6672, the increase in the corporation's cash balances as of the time he resigned as president should absolve him of liability. Specifically, petitioner points to the fact that as of the reorganization that required his resignation as president, Edmap had \$29,930.95 in cash on hand, which was sufficient to pay substantially all of its employment tax liability (see Pet. App. C, p. 16; Pet. App. A, p. 3).

The court of appeals rejected this defense to Section 6672 liability. Since petitioner depleted the Edmap cash balances to an amount less than the taxes withheld during the April 1-June 22 period, the court held that he "risked subjecting himself to liability if, as in fact happened, insufficient funds were available on July 31 to cover the taxes collected for the preceding quarter." Finally, the court observed that petitioner's failure to pay the taxes after he resumed the presi-



dency of Edmap reinforced its finding of willfulness (Pet. App. A, pp. 6-7).

Subsequent to the filing of the petition in this case, this Court rendered its decision in *Slodov v. United States*, No. 76-1835, decided May 22, 1978. There, the Court held that a responsible officer was not liable for taxes withheld and dissipated prior to his assumption of control of a corporation because neither Section 6672 nor Section 7501 impresses a trust on the after-acquired funds of the corporation absent tracing of those funds to the taxes collected. Since the previous management had failed to pay over the taxes when due and had used the withheld taxes for other purposes, the Court refused to impose Section 6672 liability upon the successor officer for failure to use after-acquired funds to discharge the tax liability.

This case is the converse of *Slodov* but with two variations. Here, the government sought to impose personal liability against the predecessor rather than the successor officer. Like the prior management in *Slodov*, petitioner had dissipated the withheld taxes during his control of the corporation. However, unlike the situation in *Slodov*, here the corporation's cash balance increased to an amount substantially equal to its withholding tax liability as of the time petitioner resigned from the presidency of the corporation. If the corporation's cash balances had not so increased, it is clear that under *Slodov*, the successor officer would not be personally liable for failure to use after-acquired funds to discharge the tax liability. But here the successor officer failed to pay the tax when it became due with the funds that were

in the hands of the corporation at the time he assumed control. Moreover, when petitioner reassumed the presidency of the corporation, he likewise failed to pay the tax with either the funds then on hand or with cash that was generated by the corporation's sale of an account receivable.

In *Slodov*, the Court recognized that Section 6672 cannot be construed to impose liability without fault (slip op. 15). It further observed that "under § 7501 there must be a nexus between the funds collected and the trust created" and that such a "construction is consistent with the accepted principle of trust law requiring tracing of misappropriated trust funds into the trustee's estate in order for an impressed trust to arise" (slip op. 17). Finally, it held "that § 7501 does not impress a trust on after-acquired funds, and that the responsible person consequently does not violate § 6672 by willfully using employer funds for purposes other than satisfaction of the trust fund tax claims of the United States when at the time he assumed control there were no funds with which to satisfy the tax obligation and the funds thereafter generated are not directly traceable to collected taxes referred to by that statute" (slip op. 20; footnote omitted).

Our study of the Court's opinion in *Slodov* indicates that there are two permissible readings that suggest slightly variant results in resolving the instant case. If the decision in *Slodov* turns on the fact that the trust fund was dissipated by prior management and the after-acquired funds were not di-

rectly traceable to collected taxes, then the court of appeals correctly held that petitioner's dissipation of the trust fund subjected him to Section 6672 liability despite the subsequent increase in the corporation's cash balances because those funds were different dollars and therefore not traceable to the collected taxes. The Court's requirement of a nexus between the funds collected and the trust created appears to support such a result. Moreover, the Court's refusal in *Slodov* to "make the responsible person assuming control of a business a guarantor for payment of the delinquent taxes simply by undertaking to continue operation of the business" (slip op. 14) suggests that petitioner, rather than his successor, is the proper person upon whom Section 6672 liability for the tax should attach in the amount of \$32,060.49 less the amount allocable to the period June 23-30, during which he was no longer the responsible officer.<sup>3</sup>

But if the Court's holding in *Slodov* turns on the fact that Section 6672 imposes liability only where the actions of the responsible person directly result in non-payment of the taxes, *i.e.*, liability with fault,

<sup>3</sup> If petitioner had not relinquished the presidency of the corporation, it is clear that his conduct would have been sufficient to trigger Section 6672 liability "regardless of his expectation that sufficient funds [would] be on hand on the due date for payment over to the government." *Newsome v. United States*, *supra*, 431 F.2d at 746. However, apart from the decision below, we have been unable to find any case in which Section 6672 liability has been imposed upon a responsible person who dissipates the withheld taxes but where the cash balances are substantially restored prior to his resignation from the position of responsibility. Cf. *Long v. Bacon*, 239 F. Supp. 911 (S.D. Iowa).

the increase in the corporation's cash balance prior to his resignation would still not absolve him of liability because he failed to pay the taxes when he reassumed the corporate presidency on August 2, 1967. Thus, even accepting petitioner's argument that the increase in the corporation's cash balance to \$29,930.95 as of his resignation reduced his personal liability by that amount, his failure to use the cash on hand as of August 2 (\$6,417.12)<sup>3</sup> and the after-acquired cash (\$3,567.18 + \$16,000)<sup>4</sup> to pay the taxes when he reassumed the presidency should increase his personal liability by those amounts to \$28,113.84 (plus interest) (\$32,060.49 (tax) less \$29,930.95 plus (\$6,417.12 + \$3,567.18 + \$16,000)) less the amount allocable to the period June 23-30.

We do not believe that the trust rationale of *Slodov*, which barred the imposition of Section 6672 liability upon an innocent successor officer with respect to after-acquired cash, should absolve petitioner of liability with respect to after-acquired cash during his second tenure because his actions originally

<sup>3</sup> The district court's findings indicate that Edmap's bank balance was \$6,417.12 as of July 31, 1967 (Pet. App. C, p. 18). For purposes of this discussion, we are assuming that the balance remained intact until August 2, when petitioner reassumed the presidency of Edmap.

<sup>4</sup> The \$16,000 arises from petitioner's conversion of an account receivable in that amount in exchange for a franchise agreement. Petitioner's failure to convert such a liquid asset to cash to pay the withholding taxes constitutes a preference of other creditors over the United States. Cf. *Slodov v. United States*, *supra*, slip op. 7.



resulted in the corporation's failure to pay the taxes. Unlike the officer in *Slodov*, petitioner was fully aware during both of his tenures that he was preferring other creditors of Edmap over the United States. In short, petitioner was both predecessor and successor (and, indeed, had a continuing relationship with the company during the period between his two presidential tenures) and must answer for his conduct during each period he exercised control of the corporation. During his first and second tenures as president, petitioner's actions were the direct cause of the non-payment of the tax liability in the respective amounts of \$2,129.54 and \$25,984.30.

3. Resolution of the question presented in this case should take into account the realities of the withholding process. As the Court noted in *Slodov* (slip op. 4), there is no statutory requirement that an employer maintain a segregated account for withheld taxes prior to their payment over to the government. Thus, even on the assumption that the second reading of *Slodov* is correct, the restoration of most of the originally withheld fund would not absolve petitioner of liability under Section 6672. Under this approach, as of his resignation on June 22, petitioner's liability would have been \$2,129.54 (\$32,060.49 less \$29,930.95) less the amount allocable to the period June 23-30. However, that is not the end of the matter. Petitioner's failure to use for this purpose \$6,417.12 of cash on hand and \$19,567.18 of cash acquired by the corporation to pay the taxes after his resumption

of control would increase his ability by those amounts to a maximum of \$28,113.84.

It is therefore clear that the difference in results in this case produced by the two readings of *Slodov* we have outlined above is at most \$3,946.65 (\$32,060.49 less \$28,113.84), and that in no event is petitioner correct in contending that the restoration of the cash balance of the corporation absolved him of personal liability for the entire amount of unpaid withholding taxes. Since the amount with respect to which there remains any uncertainty (at most \$3,946.65) is relatively small and does not appear to justify further litigation by petitioner, review by this Court would be inappropriate. Under the judgment of the court of appeals, the case will be remanded to the district court with instructions to recompute the judgment in favor of the United States by offsetting the full amount of the corporation's withholding tax liability (\$32,060.49) by the amount of taxes attributable to the period June 23-30.<sup>5</sup>

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<sup>5</sup> We are advised by the Internal Revenue Service that it has no information at this time as to the correct amount of the offset for the period June 23-30.



CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1978.